United States District Court
Western District of Oklahoma

Recent Changes to Local Civil Rules

The Western District of Oklahoma recently amended its Local Civil Rules. The changes to the rules are set forth below.

LCvR 6.2 (New)

LCvR6.2 Meaning of "Inaccessible"

For purposes of Fed. R. Civ. P. 6(a)(3) and LCvR6.1, the Clerk's Office is "inaccessible" when it is not open for public business due to inclement weather or other conditions such as power outages or security lock-downs, notwithstanding that electronic filing procedures may still be available. If the Clerk's Office is inaccessible for any part of a day under this Rule, it is deemed to be inaccessible for the entire day. To the extent possible, the Clerk's Office will post closings on the Court's website. This Rule governs only the effect of physical inaccessibility of the Clerk's Office, not technical failures of the Court's CM/ECF system, for which separate provision is made in the Electronic Filing Policies & Procedures Manual, Section II.F.1.

COMMITTEE NOTE: Some federal courts have held that the court clerk's office is "accessible" for purposes of Fed. R. Civ. P. 6(a)(3) so long as electronic filing procedures are available, notwithstanding courthouse closings for inclement weather or other circumstances. *See, e.g., Miller v. City of Ithaca*, No. 3:10-cv-597, 2012 WL 1589249, at *3 (N.D.N.Y. May 4, 2012) ("With electronic filing, the Clerk's office was accessible for purposes of filing papers and [d]efendants could have filed their motion in a timely manner."). This result is troubling for two reasons: (1) it has the effect of establishing different computational rules depending on whether a litigant is able to file through ECF procedures; and (2) as a practical matter, at least when inclement weather has caused the court clerk's office to close, the condition causing the closing will likely also affect attorneys' ability to finalize and file documents. The proposed rule establishes a bright-line rule for "inaccessible" and resolves questions regarding the effect of a partial day's closing.

LCvR 7.1 (Modification)

LCvR7.1 Motion Practice.

[Subparagraphs (a) to (k) – no changes.]

~~(l) **Motions to Amend or Add Parties.** In a motion to amend or a motion to add parties, the movant shall state: (1) the deadline date established by the scheduling order, if any; (2) whether any other party objects to the motion; and (3) shall include as a separate section under the heading "Relief Requested" a statement of the precise relief requested by the motion. All such motions shall be accompanied by a proposed order which specifically sets forth what is being amended and/or the names of parties being added, which shall not differ in any respect from the relief requested in the motion.~~

(~~m~~l) **Motion and Brief as One Document**. A motion and brief in support may be filed as one document if identified as such in the title of the document.

(m) **Supplemental Authority**. If authority directly relevant to an issue raised in a pending motion is issued after a party's final brief on that motion has been filed, the party may file a Notice of Supplemental Authority, attaching the new authority, without leave of court. The Notice of Supplemental Authority shall not contain any argument but may identify the proposition in filed briefs to which the authority is relevant. If a party desires to present argument regarding the new authority, the party must apply for leave to file a supplemental brief.

(n) **Exhibits, Attachments, and Appendices**. Unnecessarily voluminous exhibits, attachments, and appendices to filings should be avoided. A filer should submit as an exhibit or attachment only excerpts of documents that are relevant to the matter under consideration. Excerpted material must be clearly and prominently identified as such and, upon request, the filer must promptly provide to any requesting party, including the Court, the full document from which the excerpt was taken. No response or reply brief shall include an exhibit or attachment that is already included with the motion under consideration; reference shall instead be made to the exhibit or attachment to the motion under consideration, using the ECF Document Number.

COMMITTEE NOTE: The committee recommends three modifications to Local Civil Rule 7.1. First, in light of a proposed new rule regarding motions to amend (LCvR 15.1, discussed below), the committee recommends that subparagraph (l) be stricken and the remaining subparagraphs be renumbered.

Second, the committee recommends the addition of a new provision, at subparagraph (m), that would permit parties to submit new authority without leave of court. This provision is designed to address uncertainty as to how to proceed in the event of a new statute or decision that is relevant to an issue in a pending motion, and also to curtail the use of new authority as an excuse for additional argument. The proposed rule permits the submission of a notice of supplemental authority, limits that permission to certain circumstances, and instructs that argument shall not be presented without first obtaining leave of court.

Third, the committee recommends the addition of a new provision, at subparagraph (n), that would address the submission of unnecessarily voluminous exhibits to motions. The proposed provision encourages parties to submit only relevant excerpts of documentary exhibits. Further, the provision directs that a document that has already been submitted in the briefing for a particular motion be referred to by ECF Document Number rather than resubmitted with a later response or reply brief. As part of this revision, a cross-reference to the proposed provision would be included in the Electronic Filing Policies & Procedures Manual.

LCvR 15.1 (New)

> **LCvR15.1 Amended and Supplemented Pleadings.**
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> A party moving under Fed. R. Civ. P. 15(a)(2) to amend a pleading, or under Fed. R. Civ. P. 15(d) to supplement a pleading, must attach the proposed pleading as an exhibit to the motion. The motion shall state: (1) the deadline date established by the scheduling order, if any, and (2) whether any other party objects to the motion.
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> Unless the court orders otherwise, a party who has been granted leave to amend or supplement must file the new pleading—which shall not differ from the proposed pleading previously submitted to the court—within 7 days. The pleading must be served on each newly-added party in accordance with Fed. R. Civ. P. 4, and on each previously-served party in accordance with Fed. R. Civ. P. 5.

COMMITTEE NOTE: The committee recommends that this new rule be adopted to require the filing of a proposed revised pleading with a motion to amend. In the Tenth Circuit, the federal district courts of Colorado, Kansas, New Mexico, and Utah require that parties seeking leave to amend or supplement a pleading must submit a copy of the proposed revised pleading; those in Oklahoma and Wyoming do not. Practicing attorneys have expressed that the rule would ensure full and accurate notice of the amendments that are being proposed, and, in light of modern word processing systems, would not add significantly to the expense of preparing a proper motion to amend (i.e., one that specifies the amendments to be made). Court personnel have indicated that the

rule would be particularly useful in evaluating motions to amend by pro se litigants, which often fail to reflect clear specification of the facts or claims the movant is seeking to add.

LCvR 16.2 (Modification)

LCvR16.2 Judicial Settlement Conferences.

(a) **Scheduling**. Parties may individually or jointly request that a case be referred for a judicial settlement conference. The court may also refer the case for a judicial settlement conference with or without a request from a party. Whether a case will be automatically referred to a judicial settlement conference varies by district judge. The parties should refer to the rules and/or procedures of the district judge assigned to the case for more information. ~~(a) **Scheduling**. Once a civil case is set on a trial docket, that case will generally be scheduled for a settlement conference before a judge not otherwise assigned to the case. A judicial settlement conference may also be set by the court at any other time, with or without a request from a party.~~

[Subparagraphs (b) to (h) – no changes.]

COMMITTEE NOTE: In light of changes in referral procedures by a majority of the Court's district judges, the committee recommends that Local Civil Rule 16.2(a) be amended to reflect current practice.

LCvR 26.3 (New)

LCvR26.3 Discovery to Begin When Case Is at Issue Unless the Parties Agree or the Court Orders Otherwise.

(a) Subject to the exceptions set forth in subsections (b) and (c) of this rule, if a motion has been made pursuant to Fed. R. Civ. P. 12(b), no party may seek discovery from any source before that motion has been decided and all moving parties have filed an answer or been dismissed from the case.

(b) The parties may stipulate that discovery is permitted prior to the time period set forth in subsection (a) of this rule, either generally or with respect to a specific subject, party, or nonparty.

(c) Any party may move that discovery be permitted prior to the time period set forth in subsection (a) of this rule. Such request shall be made by written motion in accordance with LCvR7.1 and LCvR37.1. While the motion may be made at any time, it is generally contemplated

that it will be filed at the time of submission of the parties' Discovery Plan and addressed during the Status and Scheduling Conference.

COMMITTEE NOTE: The committee recommends that this new rule be adopted to preserve longstanding local practice regarding the commencement of discovery, while allowing adjustment to evolving federal rules regarding the timing of status conferences. The 2015 amendments to the Federal Rules of Civil Procedure—which have been approved by the U.S. Supreme Court and, assuming approval by Congress, will take effect in December 2015—include several significant rule changes designed to facilitate "early case management." One of the 2015 amendments, to Fed. R. Civ. P. 16(b)(2), will increase the likelihood in this district that status conferences be held while a motion to dismiss is pending.

Aside from being significant in itself, this change eliminates what had been an effective default in this district of a stay of discovery through the pendency of a motion to dismiss. Specifically, under Fed. R. Civ. P. 26(d)(1), discovery commences only after the parties hold their Fed. R. Civ. P. 26(f) discovery conference, and under LCvR 16.1(a)(1) the date of the Rule 26(f) discovery conference is tied to the date of the status conference. For many years the local practice was to set status conferences after cases became "at issue," i.e., after any motion to dismiss was decided and an answer was filed. The result of these rules and local practice was to cause the Rule 26(d)(1) stay of discovery to extend through the pendency of any motion to dismiss.

Amendments to Fed. R. Civ. P. 16(b)(2), which currently requires scheduling orders to be entered within the earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared, have affected that result. Over the last several years, most of the district judges have changed their practices and are now setting status conferences in time to issue scheduling orders within the Rule 16(b)(2) time limit. The court generally has been able to issue rulings on motions to dismiss prior to the status conferences, thereby preserving the customary sequence of the status conference being held after the motion to dismiss is decided. With the 2015 amendments, however, the Rule 16(b)(2) time limit for issuance of a scheduling order will be shortened to the earlier of 90 days after any defendant has been served or 60 days after any defendant has appeared.

This means that the prevalent procedure is likely to be, as it is in most districts, that status conferences are held while a motion to dismiss is pending and, as a result, that discovery will commence prior to disposition of the motion to dismiss. The committee believes that in most cases there is a benefit to resolving initial legal issues prior to the parties incurring the substantial expense of discovery. *See, e.g., Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1966-67 (2007) (discussing value of determining sufficiency of complaint "at the point of minimum expenditure of time and money by the parties and the court"). The proposed new local rule would restore the presumption in this district that discovery is to commence after a pending motion to dismiss is decided and an answer filed, but allow the Court or the parties to freely make exceptions where appropriate.

LCvR 45.1 (New)

LCvR45.1 Subpoenas to Nonparties to Produce Documents.

(a) **Seven Days Advance Notice to Other Parties**. The notice required by Fed. R. Civ. P. 45(a)(4), with the attached proposed subpoena copy, shall be filed at least 7 days before the original subpoena is served on the person to whom it is directed.

(b) **Motion for Protective Order**. Within 7 days from the filing of the notice provided in LCvR45.1(a), any party may file a motion to preclude service of the proposed subpoena, in whole or in part, on any ground for which a protective order may be sought. If a motion under this rule is timely filed, the original subpoena shall not be served on the person to whom it is directed until the motion is determined.

(c) **Other Remedies Unaffected**. Failure to file a motion under LCvR45.1(b) does not preclude any party or person from invoking other remedies, such as a subsequent motion for protective order or a motion to quash or to modify the subpoena under Fed. R. Civ. P. 45(d).

COMMITTEE NOTE: The committee recommends the adoption of this new rule addressing the notice period and procedures for document subpoenas on third parties. In light of a 2007 amendment and 2013 clarification, Federal Rule of Civil Procedure 45 requires that a party seeking to subpoena documents from a nonparty give advance notice to the other parties of the subpoena. The purpose of the notice period is to allow other parties to challenge the subpoena (for example, on grounds of privilege or harassment) before the recipient turns over the documents.

Left unresolved by Rule 45 is how far in advance the notice must be given. Many districts have prescribed the notice period by local rule. The proposed new local rule specifies a seven-day notice period and establishes procedures to be followed in the event a party seeks to preclude or limit the nonparty's production of documents.

LCvR 56.1 (Modification)

LCvR56.1 Summary Judgment Procedure.

(a) Absent leave of court, each party may file only one motion under Fed. R. Civ. P. 56.

(b) The brief in support of a motion for summary judgment (or partial summary judgment) shall begin with a section stating the material facts to which the movant contends no genuine dispute exists. The facts shall be set forth in concise, numbered paragraphs.~~that contains a concise~~

~~statement of material facts to which the moving party contends no genuine issue of fact exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies.~~

(c) The brief in opposition to a motion for summary judgment (or partial summary judgment) shall begin with a section responding, *by correspondingly numbered paragraph*, to the facts that the movant contends are not in dispute and shall state any fact that is disputed. Separately, the brief in opposition may, in concise, numbered paragraphs, state any additional facts the nonmovant contends preclude judgment as a matter of law. The nonmovant shall not present facts that are not material to an issue raised by the movant.~~which contains a concise statement of material facts to which the party asserts genuine issues of fact exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies and, if applicable, shall state the number of the movant's facts that is disputed. All material facts set forth in the statement of the material facts of the movant may be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party.~~

(d) Each individual statement by the movant or nonmovant pursuant to subparagraph (b) or (c) of this rule shall be followed by citation, with particularity, to any evidentiary material that the party presents in support of its position pursuant to Fed. R. Civ. P. 56(c).

(e) All material facts set forth in the statement of material facts of the movant may be deemed admitted for the purpose of summary judgment unless specifically controverted by the nonmovant using the procedures set forth in this rule.

COMMITTEE NOTE: The committee recommends the modification of Local Civil Rule 56.1 to emphasize the organizational structure required for summary judgment briefs, including that the movant's facts are to be disputed through correspondingly numbered paragraphs and that the opponent shall not present facts that are not relevant to an issue raised by the movant. Further, the language of the rule has been updated to better match the phrasing currently used in Federal Rule of Civil Procedure 56 and to reflect longstanding summary judgment practice in this district.